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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PATRICK F. BILY,

Plaintiff and Appellant,

v.

DANIEL ENCELL et al.,

Defendants and Respondents.

2d Civil No. B285753
(Super. Ct. No. 15CV02237)
(Santa Barbara County)

Patrick F. Bily appeals from the judgment entered, after a non-jury trial, in favor of respondents Daniel Encell and Berkshire Hathaway Homeservices on Bily's claim for breach of fiduciary duty. Appellant, who is representing himself, has filed an opening brief which is difficult to understand but which appears to contend that the trial court erred when it: denied him a jury trial; denied his motion to disqualify (Code Civ. Proc., § 170.1)¹; failed to consider a brain injury appellant suffered

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

during trial; failed to provide a court reporter for the trial; denied appellant a fair trial; refused to consider appellant's motion for summary judgment; and excluded evidence proffered by appellant. We affirm.

Facts and Procedural History

Appellant owned a house on Garden Street in Santa Barbara. He retained respondents, Daniel Encell and Berkshire Hathaway Homeservices, to sell the house for him. The house was listed at \$845,000. In August 2011, appellant sold the house for \$835,000.

In July 2015, appellant filed his original complaint. It alleged that respondents breached fiduciary duties toward him because they convinced him to sell the property for a price far below its fair market value. Appellant opines the house was worth at least \$2,000,000.

The trial court sustained demurrers to appellant's complaint with leave to amend. After appellant filed his first amended complaint, he filed a peremptory challenge against the trial court judge. (§ 170.6.) The peremptory challenge was rejected because it was untimely. Appellant then filed a "Statement of Disqualification of Judge," asserting the trial court judge was biased against him. (§ 170.1.) The motion was referred to another judge, who denied it as "untimely and without merit or allegations." The original trial court judge sustained demurrers to appellant's first amended complaint with leave to amend. Appellant filed his second amended complaint. After another round of demurrers, the sole cause of action remaining for trial was appellant's claim against respondents for breach of fiduciary duty.

The matter was tried without a jury. Both parties waived a court reporter, so the record on appeal does not include a reporter's transcript. After a two-day trial, the trial court found in favor of respondents. Neither party requested a statement of decision. Judgment was entered in favor of respondents on September 13, 2017.

Standard of Review

On appeal, the judgment of the trial court is presumed to be correct; error is never presumed. Appellant has the burden of overcoming this presumption by showing error on an adequate record.² (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141 (*Ketchum*)). Without a reporter's transcript of trial proceedings and other hearings, appellant cannot challenge the sufficiency of the evidence to support a judgment. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186.) Similarly, "[t]he absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion." (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448 (*Vo*); see also *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.) "Failure to provide an adequate record on an issue requires that the issue be resolved against [appellant]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 (*Hernandez*)).

² Appellant's request for judicial notice filed October 12, 2018, is granted with respect to Ex. 1 only. (Evid. Code, § 452, subd. (d).) In all other respects, the request for judicial notice is denied. (Evid. Code, § 350.) Appellant's requests for judicial notice filed August 29, November 6, 16 & 21, 2018, are also denied. (Evid. Code, § 350.)

Discussion

Jury Trial. Appellant contends the trial court improperly denied him a jury trial. We have taken judicial notice of a receipt from the superior court indicating that appellant paid an “advance jury fee” of \$150 on August 11, 2017. The record contains no other information regarding the trial court’s decision to try the case without a jury, nor does it establish that appellant objected to the non-jury trial before it began. A party waives trial by jury if that party participates in a non-jury trial without objection. (*Taylor v. Union Pacific R.R. Corp.* (1976) 16 Cal.3d 893, 900; *Escamilla v. California Ins. Guar. Ass’n.* (1983) 150 Cal.App.3d 53, 58.) The record on appeal is not adequate to show the trial court erred.

Motion to Disqualify. Appellant contends the trial court erred when it denied his motion to disqualify the trial judge. The trial court correctly denied appellant’s motion because his “Statement of Disqualification of Judge” did not state facts constituting the grounds for disqualification of the judge. (§ 170.1, subd. (a).) Appellant cites two statutory grounds for disqualification but provides no factual support for either one. (*Id.*, subds. (a)(6)(B), (a)(8)(A).) Nor did appellant comply with his statutory obligation to serve the trial court judge with a copy of his motion. (§ 170.3, subd. (c)(1).)

Brain Injury. Appellant contends the trial court erred when it failed to consider a minor brain injury appellant suffered during trial. We cannot consider this contention because appellant failed to provide an adequate record of the trial court proceedings. (*Hernandez, supra*, 78 Cal.App.4th at p. 502.)

Court Reporter. Appellant contends the trial court improperly denied him a court reporter. The clerk’s transcript

contains a minute order describing the first day of trial. It does not indicate that appellant requested a court reporter. The limited record provided by appellant does not support his contention that he was denied a court reporter. (*Ketchum, supra*, 24 Cal.4th at pp. 1140-1141.)

Fair Trial. Appellant contends he was denied a fair trial because the judge denied him a fair chance to state his case by cutting him off when he was speaking, refusing to consider certain documents and behaving as if she was bored by his presentation. In the absence of a reporter's transcript documenting what occurred at the trial, we cannot conclude that the trial court abused its discretion either in excluding evidence or in managing its calendar. (*Hernandez, supra*, 78 Cal.App.4th at p. 502.)

Motion for Summary Judgment. In October 2016, the trial court scheduled this matter for trial on May 1, 2017. On March 3, 2017, appellant filed a motion for summary judgment and set the motion for hearing 66 days later, on May 8, 2017. That hearing date appears to have been vacated because it was scheduled to occur after trial began. In any event, appellant's motion was not heard or ruled upon. Appellant contends this was error. We disagree.

Section 437c requires that a motion for summary judgment be served "at least 75 days before the time appointed for hearing." (*Id.*, subd. (a)(2).) In addition, "The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise." (*Id.*, subd. (a)(3).) Finally, the motion must be accompanied by a separate statement of undisputed facts. (*Id.*, subd. (b)(1).)

Appellant failed to comply with these requirements. The motion was filed only 66 days before the scheduled hearing date and was set for hearing after the first trial date, rather than 30 days before trial. In addition, appellant did not file a separate statement of undisputed facts until March 23, 2017. The motion for summary judgment would have been properly denied for any of these procedural errors.

Excluded Evidence. Appellant appears to contend the trial court erred when it refused to admit into evidence many of the documents on which he had intended to rely. Appellant does not specify the documents to which he refers. The documents are not included in the record on appeal, nor does the record include any explanation of the trial court's reasons for finding the documents inadmissible. The record is not adequate to demonstrate that the trial court abused its discretion in making these evidentiary rulings. (*Vo, supra*, 79 Cal.App.4th at p. 448.)

Conclusion

The judgment is affirmed. Respondents shall recover their costs on appeal.

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YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

Patrick F. Bily, in pro per, for Plaintiff and
Appellant.

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Obrand for Defendants and Respondents.